No. 04-460

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Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, and TEXAS COALITION OF CITIES FOR UTILITIES ISSUES,

Cross-Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, BRAND X INTERNET SERVICES, *et al.*,

Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION BRIEF OF RESPONDENTS EARTHLINK, INC., BRAND X INTERNET SERVICES, AND CENTER FOR DIGITAL DEMOCRACY

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QUESTION PRESENTED

Whether the definition of "cable service"—"(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service"—includes cable modem service. 47 U.S.C. § 522(6).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents submit the following corporate information:

I. EarthLink, Inc. is a publicly traded company engaged primarily in the business of providing Internet access and related value-added services to business and residential customers nationwide. EarthLink, Inc. has no parent company and no wholly-owned subsidiaries.

Sprint Corporation is a publicly traded corporation that has an ownership share in EarthLink, Inc. equal to or in excess of 10 percent. There are no other publicly traded companies that have ownership shares in EarthLink, Inc. of 10 percent or greater.

II. Brand X Internet Services is a privately held company, incorporated in California. It has no parent or subsidiaries.

III. Center for Digital Democracy is a not-for-profit corporation incorporated in the District of Columbia.

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On September 30, 2004, EarthLink, Inc. ("EarthLink"), and Brand X Internet Services ("Brand X") joined by Center for Digital Democracy, filed their respective opposition briefs responding to the petitions filed by the United States and the Federal Communications Commission ("FCC" or the "Commission") and the National Cable and Telecommunications Association ("NCTA") in Case Nos. 04-281 and 04-277. As EarthLink and Brand X there argued, although the issues presented are important, those issues have been conclusively

decided by Congress, and there is no reason for this Court to hear the case. The conditional cross-petition filed by the National League of Cities and others (hereinafter "League of Cities Cross-Petition") similarly raises no issue worthy of this Court's attention. Accordingly, all of the petitions should be denied.

STATEMENT OF THE CASE

EarthLink's Counter-Statement appears at pages 2-12 of its September 30, 2004, Opposition Brief in Case Nos. 04-277 and 04-281, and EarthLink, Brand X, and Center for Digital Democracy incorporate that Counter-Statement here. The court of appeals' discussion relevant to the issues raised by the League of Cities' Cross-Petition is reproduced at FCC Pet. App. at 7a-8a n.6, 13a, 21a. The Commission's discussion of those issues in the Declaratory Ruling that was reviewed by the Ninth Circuit is reproduced at FCC Pet. App. at 118a-132a.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

The League of Cities urges that the statutory language is clear that "cable modem service" (the term the FCC has used to describe the bundled service consisting of Internet access service and cable-based transmission of that service, *see* FCC Pet. App. at 86a) is a "cable service" under the Communications Act. The Communications Act defines cable service" as: "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6).[1] More spe-

[1] Section 602 of the Communications Act, 47 U.S.C. § 522, defines the terms there listed "[f]or purposes of this title," that is, Title VI. Section 3 of the Act, which defines terms "[f]or purposes of this Act . . . ," states that "the term 'cable service' has the meaning given such term in section

cifically, the League of Cities argues that cable modem service fits the definition of "other programming service" under 47 U.S.C. § 522(14). *See* League of Cities Cross-Petition at 16-19.[2] The Act defines "other programming service" as "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The League of Cities is incorrect.

I. THE CROSS-PETITION IGNORES THE "ONE-WAY TRANSMISSION" LANGUAGE IN THE DEFINITION OF "CABLE SERVICE."

Despite the fact that the League of Cities' primary argument is that the plain language of the statute compels the result that cable modem service is a "cable service," the League of Cities never explains how the "one-way" requirement of the Act's "cable service" definition can be squared with the reality of Internet access service, which enables the sending and receiving of information between or among two or more points and parties. As the per curiam panel in *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), held in describing the decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), "we concluded that 'the definition does not fit' cable modem service, whose salient characteristics are 'not one-way and general, but interactive and individual.'" FCC Pet. App. at 13a.

Instead of discussing the statutory language that it claims plainly supports its position, the League of Cities relies almost entirely on legislative history. *See* League of Cities Cross-Petition at 5, 10, 18. The Commission below, how-

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602." 47 U.S.C. § 153(7). The section 3 definition of "cable service" was added in 1996.

[2] It bears noting that even the cable companies, which had assumed that cable modem service was a "cable service" prior to the Ninth Circuit's decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), have abandoned the argument that cable modem service is a "cable service."

ever, properly held that a single line of legislative history cannot trump the language of the law that was enacted:

> If Congress intended by the language in the Joint Explanatory Statement to broaden the meaning of cable services to include stand-alone "information services" as defined in the 1996 Act or "enhanced services" as that term has traditionally been defined, the language of the statute itself does not reflect this intent.

FCC Pet. App. at 127a.

The legislative history cited by the League of Cities dealt with the addition of the words "or use" to section 602(6)(B) of the Communications Act, 47 U.S.C. § 522(6)(B). As the Commission properly noted in its Declaratory Ruling:

> The amendment itself addresses only the use of content otherwise qualifying as cable service. As the D.C. Circuit has pointed out, the subsection of the definition permitting subscriber interaction is qualified by the term "if any," implying that "subscriber interaction . . . is not a necessary component of cable service." Cable service continues to be defined as "the one-way transmission to subscribers," and both video programming and other programming services remain subject to this limitation.

FCC Pet. App. at 125a-126a (footnotes omitted). In light of that statement, the League of Cities is also incorrect in claiming that "[t]he Commission did not address the plain, and broad, meaning of the phrase, 'or use.'" League of Cities Cross-Petition at 10.

In addition to ignoring the words that are in the statute ("one-way transmission"), the League of Cities also seeks to add words that are not there. The League of Cities' central argument is that cable modem service is an "other programming service" within the meaning of the Communications Act. *See* League of Cities Cross-Petition at 18. The League of Cities properly quotes the definition of "other programming service" as meaning "information that a cable

operator makes available to all subscribers generally." *Id.*[3] However, on at least two other occasions in its cross-petition, the League of Cities suggests through misleading quotations that the word "information" in that definition instead reads "information service." On page 6 of its cross-petition, the League of Cities states that:

> To the contrary, "cable service" includes any "information service" that "a cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14) . . . .

The combination of placing the term "information service" in quotes and citing without signal or explanation to the definition of "other programming service" appears calculated to suggest that the phrase "information service" appears in the definition of "other programming service." It does not. This error is compounded by the fact that "information service" is itself a defined term under the Communications Act, 47 U.S.C. § 153(20), and one of particular relevance to the issue in Case Nos. 04-277 and 04-281. The League of Cities repeats the error on page 12 of the cross-petition:

> Indeed, as a result of the 1996 amendment expanding the "cable service" definition, cable modem service is a "cable service" precisely because it is an "information service" that a "cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14) . . . .[4]

Much as the FCC and the NCTA in their petitions urge a reading of the term "telecommunications service" that can

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[3] The "one-way transmission" requirement of the definition of "cable service" applies to both "video programming" and "other programming service." *See* 47 U.S.C. § 522(6); *see also* FCC Pet. App at 122a-123a, 126a.

[4] A similar error, albeit without a direct citation to the statute, occurs on page 17, where the League of Cities states that: "Those rules of construction point clearly to the conclusion that Congress intended 'cable service' to include all 'information services' made available to subscribers generally over a cable system, meaning that cable modem service is a 'cable service.'"

only be supported if they add words to the statute, the League of Cities here offers a "plain meaning" argument that relies on words not in the statute. That improper reliance removes the entire basis for the cross-petition.

II. BOTH *PORTLAND* AND THE COMMISSION'S DECLARATORY RULING ADDRESSED THE "ONE-WAY" LANGUAGE OF THE DEFINITION OF "CABLE SERVICE."

The League of Cities' second ground for granting the cross-petition is that "[t]he court of appeals should not have relied on the rationale of *Portland* to affirm the *Declaratory Ruling's* 'cable service' conclusion because the Commission did not rely at all on *Portland's* rationale in reaching that result." League of Cities Cross-Petition at 23. To be sure, the Commission kept its distance from *Portland*, but that does not mean that "the *Declaratory Ruling* relied on different reasoning than *Portland* . . . ." *Id.* at 24.

Part of the Commission's discussion of the "one-way" language in the Declaratory Ruling is as follows:

> 61. *One-Way Transmission to Subscribers.* The phrase "one-way transmission to subscribers" in the definition reflects the traditional view of cable as primarily a medium of mass communication, with the same package or packages of video programming transmitted from the cable operator and available to all subscribers. When the definition was enacted in 1984, cable systems designed for the traditional one-way delivery of programming were developing the capability to provide "'two-way' services, such as the transmission of voice and data traffic, and transactional services such as at-home shopping and banking." The legislative history indicates that Congress intended the cable service definition "to mark the boundary between those services provided over a cable system which would be exempted from common carrier regulation under section 621(c) and all other communications services that could be provided over a

> cable system." Thus, the definition reflected the traditional view that the one-way delivery of television programs, movies, and sporting events is not a traditional common carrier activity and should not be regulated as such.

FCC Pet. App. at 120a (footnotes omitted). That discussion continues at FCC Pet. App. at 121a-125a.

The *Portland* court had this to say about the same topic:

> The Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). For the purposes of this definition, "video programming" means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. § 522(20), and "other programming service" means "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The essence of cable service, therefore, is one-way transmission of programming to subscribers generally.
>
> This definition does not fit @Home. Internet access is not one-way and general, but interactive and individual beyond the "subscriber interaction" contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming. And unlike transmission of a cable television signal, communication with a Web site involves a series of connections involving two-way information exchange and storage, even when a user views seemingly static content. Thus, the communication concepts are distinct in both a practical and a technical sense. Surfing cable

> channels is one thing; surfing the Internet over a cable broadband connection is quite another.

Portland, 216 F.3d at 876-877.

A side-by-side comparison of what the court said in *Portland* and what the Commission said in its Declaratory Ruling demonstrates that the reasoning of the two bodies regarding the definition of "cable service" is in fact the same. Moreover, both the *Portland* court and the Commission cited with favor *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994), in their discussions of why cable modem service is not a "cable service." *See Portland*, 216 F.3d at 877, *and* FCC Pet. App. at 121a. Accordingly, the League of Cities' contention that the *Brand X* court upheld the Commission on an impermissible basis with respect to the "cable service" issue is both factually and legally incorrect.

CONCLUSION

Neither of the two original petitions raises any issue that requires this Court's attention. Accordingly, there is no need to evaluate the cross-petition in detail. Even if one or both of the original petitions were granted, however, the cross-petition raises no issue that meets this Court's standards for certiorari. The cross-petition should be denied.

Respectfully submitted,

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